

**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E**

IN RE:

Friends of the Earth and Sierra Club,

Complainants/Petitioners,

v.

South Carolina Electric & Gas Company,

Defendant/Respondent.

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IN RE:

Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920.

**JOINT APPLICANTS'  
PRE-HEARING BRIEF**

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IN RE:

Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Inc., for review and approval of a proposed business combination between SCANA Corporation and Dominion Energy, Inc., as may be required, and for a prudence determination regarding the abandonment of the V.C. Summer Units 2 & 3 Project and associated customer benefits and cost recovery plan.

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Joint Applicants South Carolina Electric & Gas (“SCE&G”) and Dominion Energy, Inc. (“Dominion Energy”) (collectively, “Joint Applicants”), by and through the undersigned counsel and pursuant to the Commission’s August 23, 2018 and October 3, 2018 Orders, hereby jointly submit the following pre-hearing brief to the Commission.

**I. SUMMARY OF MERGER PETITION AND RELIEF SOUGHT IN DOCKET NO. 2017-370-E**

SCE&G and Dominion Energy brought the Joint Application in Docket No. 2017-370-E pursuant to S.C. Code Ann. § 58-33-280(K) and § 58-27-870(F). In reliance on those two statutory provisions, Joint Applicants are asking the Commission to:

- (1) Recognize the amount of the allowable investment in the abandoned NND Project that is now subject to recovery;
- (2) Reduce that investment through certain accounting adjustments, as specified in the Joint Application;
- (3) Authorize SCE&G to amortize the remaining balance of that investment into allowable utility expenses;
- (4) Specify the amortization period for recovery of that regulatory asset; and
- (5) Allow SCE&G to recognize its statutorily mandated cost of capital on the unamortized balance of that asset, again subject to certain voluntary adjustments.

Joint Applicants do not seek any rate increase or any other relief under the Revised Rates provisions of the Base Load Review Act, S.C. Code Ann. §§ 58-33-280(A)–(I), or any other statute.

Joint Applicants are also seeking the Commission’s approval of the business combination between SCE&G and Dominion Energy with no material changes to its terms under S.C. Code Ann. § 58-27-1300 or any other applicable law. Alternatively, if the Commission determines that formal approval of the combination is not required, the Joint Applicants ask the Commission

to find that: (i) the combination is in the public interest; or (ii) there is an absence of harm to South Carolina ratepayers as a result of the combination.

The Joint Applicants have provided extensive testimony establishing Dominion Energy's financial, technical, and managerial abilities to successfully conduct utility operations, its commitment to safety, reliability, cost-effectiveness and excellence in such operations, and its ability to deliver superior customer service. Dominion Energy has committed, among other things, to provide important protections for SCE&G employees, the continuation or enhancement of SCE&G's engagement with the communities it serves, a continued local operational and management presence in South Carolina, and continued investment in South Carolina's energy infrastructure.

In support of the application, the Joint Applicants have proposed three alternative plans:

The ***Customer Benefits Plan*** would take effect upon closing of the business combination between SCE&G and Dominion Energy. It will involve, among other things, upfront payments by check to current retail electric customers totaling \$1.3 billion, a refund of \$575 million which, in combination with reductions related to the Tax Cuts and Jobs Act of 2017 ("TCJA"), would reduce the bills by approximately 7% from the May 2017 bill level, creation of a Capital Cost Rider Component to segregate the recovery of NND Project investments from other assets, rates, and revenues; and total write-downs of approximately \$2.8 billion. These write-downs include write-downs taken through December 31, 2017. The remaining balance of NND Project investment would be recovered over 20 years.

SCE&G has provided financial analyses showing that under the Customer Benefits Plan, its retail electric return on equity ("ROE") based on a 12-month test period ending December 31,

2017, and after writing down rate base by \$1.4 billion, would be 8.83 percent, which is 142 basis points below its currently allowed ROE.

The *No Merger Benefits Plan* could be offered by SCE&G apart from the business combination with Dominion Energy and is a disfavored option. It would involve, among other things, an immediate reduction in retail electric rates of 3.5%, as compared to rates in force at the end of May 2017, and write-downs totaling \$1.1 billion, including write-downs of the capital costs associated with the NND Project taken through December 31, 2017. The No Merger Benefits Plan provides for the amortization of NND Project investment over 50 years. SCE&G has provided financial analyses showing that under the No Merger Benefits Plan, its retail electric ROE based on a 12-month test period ending December 31, 2017, and after writing down assets by \$1.1 billion, would be 8.53 percent, which is 172 basis points below its currently allowed ROE.

The *Base Request* reflects the rate making treatment that SCE&G could request as a matter of law. That request does not provide any rate reduction or substantial rate mitigation for customers and is also a disfavored option. It does not provide for any write-down of the capital costs associated with the NND Project and reflects the amortization of NND Project investment over 50 years. SCE&G has provided financial analyses showing that under the Base Request, its retail electric ROE based on a 12-month test period ending December 31, 2017, would be 9.19 percent, which is 106 basis points below its currently allowed ROE.

All three plans provide for SCE&G to expense the initial capital cost associated with the acquisition cost of the 540 MW combined cycle natural gas generation facility known as the Columbia Energy Center. All three plans provide for a Tax Rider to return to customers the reduction in retail electric rate expense resulting from the TCJA. SCE&G will further return to

customers the savings under the TCJA that have accrued since January 1, 2018, through a bill credit to be issued following entry of the order in this matter. All three plans recognize the transfer to electric rate base of the investment in transmission assets that were constructed as a part of the NND Project and that have been, or will be, placed in service. The latter two plans also recognize the transfer of approximately \$85 million of additional assets that will be placed in service to support electric generation, while this amount is written off under the Customer Benefits Plan.

On October 25, 2018, Dominion Energy filed supplemental rebuttal testimony in which it proposed an *Alternative Customer Benefits Plan* which, among other things, provides an approximately 14% reduction in retail electric bills and eliminates the \$1.3 billion upfront refund payments. The plan had been the subject of confidential negotiations with certain stakeholders prior to being filed with the Commission.

## II. THE DECLARATORY MOTION

The Joint Applicants have filed a Motion for Declaratory Rulings and Motion *in Limine* (the “Declaratory Motion”), dated October 19, 2018. In it, Joint Applicants show that the principal claims of ORS and other parties are legally precluded because they seek to overturn matters litigated in prior dockets and findings made in prior Commission orders. Under the doctrine of collateral estoppel, ORS and the other parties are precluded from reopening these issues.

Further, retroactive application of the terms or prudency definitions of Act 258 would be unlawful for three reasons. First, the General Assembly cannot, under the separation of powers doctrine, enact a statute that overturns the result in a case that the Supreme Court had already decided. *Lindsay v. Nat’l Old Line Ins. Co.*, 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974). The South Carolina Supreme Court interpreted the BLRA and concluded that prior prudency

determinations made under the BLRA “*may not be challenged or reopened in any subsequent proceedings.*” *S. Carolina Energy Users Committee v. S. Carolina Elec. and Gas*, 410 S.C. 348, 359, 764 S.E.2d 913, 918 (S.C. 2014) (quoting S.C. Code Ann. § 58-33-275(B)) (emphasis added).

Second, for a statute to be applied retroactively “the words used in the statute must be so clear, strong, and imperative that no other meaning can be annexed to them, or the intention of the legislature must be such that it cannot be otherwise satisfied. In general, courts will apply a statute retroactively only if that result is so clearly compelled as to leave no room for reasonable doubt, and will refuse to apply a statute retroactively absent statutory language so clear that it could sustain only one interpretation.” *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 174 (4th Cir. 2010) (internal citations and quotation marks omitted). Act 258 does not meet that standard.

Third, a statute cannot be retroactively applied to “divest or limit a vested right.” *Gatewood v. S. Carolina Dep’t of Corr.*, 416 S.C. 304, 320-21, 785 S.E.2d 600, 609 (Ct. App. 2016), reh’g denied (June 2, 2016), cert. denied (May 30, 2017); *see also Dunham v. Davis*, 229 S.C. 29, 35, 91 S.E.2d 716, 718 (S.C. 1956). It cannot “attach[] a new legal consequence to events completed before its enactment.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

For these reasons as stated in the Declaratory Motion, the terms of Act 258 cannot be applied retroactively.

### **III. THE ORS PLAN**

ORS has proposed an alternative plan (the “ORS Plan”) that would reduce SCE&G’s annual retail electric revenue by approximately \$560.7 million in 2019, and \$527.5 million in 2020, as compared to rates in effect at the end of May 2017. This plan would require SCE&G to write down its equity by a total of \$2.5 billion.

SCE&G has filed rebuttal testimony demonstrating that the ORS Plan would result in an ROE of 7.66% percent, even after writing down assets by approximately \$2.5 billion, which is 259 basis points below the currently allowed ROE. SCE&G's financial testimony and exhibits demonstrate that the ORS Plan would result in a company that would be financially unsustainable and potentially un-creditworthy, with debt ratings one or more notches below the speculative level. SCE&G's witnesses testify that adoption of this plan could injure customers in the long-term through potentially higher costs and lower investment in the electrical system. Dominion Energy's Chief Executive Officer has testified that the adoption of this plan would place the business combination with SCE&G in jeopardy.

The ORS Plan achieves a \$560.7 million annual rate reduction in 2019, and a \$527.5 million annual rate reduction in 2020, in part by denying SCE&G recovery for any of its spending on the NND Project after March 12, 2015, the date on which SCE&G filed its application in Docket No. 2015-103-E. ORS bases its proposed disallowance of these costs on the allegation that SCE&G intentionally concealed material information concerning challenges being faced by the NND Project. SCE&G has presented evidence refuting this allegation and demonstrating that ORS was informed and fully aware of the challenges being faced by the NND Project in 2015, as shown by the settlement agreement, as well as testimony and findings in the Commission's order in Docket No. 2015-103-E. SCE&G has also submitted evidence refuting the allegation that the 2015 project assessment performed by the Bechtel Corporation under attorney-client privilege generated material information that was not disclosed to ORS or the public. SCE&G will show – as has been admitted in the deposition testimony of ORS's expert construction witness Mr. Gary Jones – that ORS was familiar with all material challenges and issues discussed in the Bechtel assessment.

ORS further justifies the rate reductions sought under the ORS Plan based upon unsubstantiated projections of merger savings, the denial of current recovery for transmission and generation assets being placed in service, an ROE that is 259 basis points below the current allowed ROE (which understates the current risk profile of the Company), and an unreasonable calculation of the TCJA impacts. Through its testimony, the Joint Applicants have challenged each of these items.

#### **IV. SUMMARY OF REBUTTAL ARGUMENTS TO ADDITIONAL DOCKETS NOT COVERED ABOVE**

In Docket No. 2017-207-E, Friends of the Earth and Sierra Club (collectively, “Petitioners”) seek “a full Commission review of Project costs, alternatives and remedial measures,” including refunds and reparations of rates lawfully charged to customers, and an order halting construction of the NND Project. As SCE&G has previously argued, the relief sought is not available under the statutory provisions under which Petitioners filed that action, and the relief sought is duplicative of the relief now being sought in Docket No. 2017-370-E. Moreover, Petitioners themselves admit that they have already been granted the crux of the relief they seek in Order No. 2018-459, thereby mooted the need for further action from the Commission. In their direct testimony, the Friends of the Earth and Sierra Club have not submitted substantial evidence supporting the relief requested in this docket, and it should therefore be dismissed.

In Docket No. 2017-305-E, ORS seeks relief pursuant to S.C. Code Ann. § 58-28-920 in the form of: (1) the immediate suspension of all revised rate collections from SCE&G’s customers; (2) an order requiring SCE&G to cease and desist from collecting revised rates; and (3) an order requiring credits to future bills or refunds be made to customers for prior revised rates collections. As SCE&G has previously argued in its motion to dismiss that request, it was



improper for ORS to seek relief pursuant to § 58-27-920 because it failed to conduct the inspection, audit, and examination of SCE&G's revenue requirements needed to trigger the Commission's statutory jurisdiction to consider ORS's request. Nor did ORS determine or attempt to determine that the rates it proposed were fair and reasonable as the statute requires. Even after the Commission ordered it to undertake such an inspection, ORS failed to do so, producing only an unsigned, unverified "examination" purportedly performed by a local attorney speculating about the likelihood of SCE&G filing for bankruptcy if ORS's request is granted. In its case-in-chief, ORS failed to submit any testimony meeting the statutory standard for the relief requested in this docket, and it should be dismissed.

## **V. LIST AND SUMMARY OF FILED MOTIONS AND RELIEF SOUGHT**

SCE&G – both with Dominion Energy and on its own – has filed a number of motions in the Consolidated Dockets and hereby reasserts those motions and the arguments set forth in support thereof. An overview of some of the most significant arguments made in the various substantive motions and supporting briefs filed by SCE&G is attached hereto and incorporated herein as *Exhibit 1*.

## **VI. WITNESS SUMMARIES**

Pursuant to the Commission's Order dated October 19, 2018, Joint Applicants identify the following non-pre-filed witnesses from whom they expect to elicit testimony at the hearing in the Consolidated Dockets, as well as a brief summary of the testimony being sought from each such witness.

### **A. *George Wenick (Live Testimony & Testimony by Deposition)***

George Wenick is an attorney at the firm Smith, Currie & Hancock, LLP, who served as counsel to SCE&G and Santee Cooper with respect to the NND Project. Mr. Wenick was deposed on October 2, 2018, and counsel for all parties to the Consolidated Dockets had the

opportunity to appear at that deposition. The transcript of Mr. Wenick's October 2, 2018 deposition is attached hereto and incorporated herein as **Exhibit 2**. Mr. Wenick will also travel from Atlanta, Georgia to provide live testimony at the hearing in the Consolidated Dockets. Mr. Wenick will likely testify regarding: (1) his firm's retention of Bechtel; (2) the reasons why it was important that the Bechtel study be conducted under attorney-client privilege; (3) the scope of work requested from Bechtel; (4) the deficiencies in the work product generated by Bechtel (including various reports, schedule estimates, and recommendations); (5) his determination that many of the observations noted by Bechtel were rendered moot by the October 2015 Amendment to the EPC Contract (which Amendment was being negotiated at the time Bechtel was performing its assessment); (6) his determination that the schedule analysis and project schedule produced by Bechtel was of no material value; and (7) and his general dissatisfaction with Bechtel's actions and work product. He may also testify regarding non-privileged communications with SCE&G and Santee Cooper concerning the report. He may testify regarding any matter raised in his October 2, 2018 deposition.

**B. Stephen Byrne (Testimony by Deposition or Live)**

Steve Byrne is the former President for Generation and Transmission of SCE&G. He was deposed on August 14, 2018, and on October 23, 2018. Counsel for all parties to the Consolidated Dockets had the opportunity to appear at those depositions. The transcript of Mr. Byrne's August 14, 2018 deposition is attached hereto and incorporated herein as **Exhibit 3**. The transcript of Mr. Byrne's October 23, 2018 deposition is not yet available, but it will be filed as **Exhibit 4** to this pre-hearing statement in advance of his testimony when it becomes available, and he may be called as a subpoena witness or portions of his deposition testimony will be read and/or presented by videographic means at the hearing in the Consolidated Dockets. Mr. Byrne is expected to testify regarding: (1) the decision to construct the NND Project; (2) the selection

of suppliers and designs for the units; (3) the decision to use Westinghouse on the NND Project; (4) the contents of the original and 2015 Amendment to the EPC Contract; (5) licensing, productivity, sub-module delay, design finalization and other challenges and issues faced by the project; (6) SCE&G's efforts to enforce its rights under the EPC Contract and to motivate the contractors to improve their performance; (7) the NND Project schedule as it evolved over the course of the project; (8) the retention of Bechtel; (8) Fluor's involvement with the NND Project; (9) interactions with Westinghouse and other consortium members, Westinghouse's commitment to the project and eventual bankruptcy; (10) the role and actions of Santee Cooper related to the NND Project; and (11) other relevant aspects of his involvement with the NND Project as a senior leader of it.

***C. Ron Jones (Testimony by Deposition)***

Ron Jones is SCE&G's former Vice President of New Nuclear Development. Mr. Jones was deposed on October 16, 2018, and counsel for all parties to the Consolidated Dockets had the opportunity to appear at the deposition. The transcript of Mr. Jones's October 16, 2018 deposition is not yet available, but it will be filed as ***Exhibit 5*** to this pre-hearing statement in advance of his testimony when it becomes available, and portions of his deposition testimony will be read and/or presented by videographic means at the hearing in the Consolidated Dockets. Mr. Jones will testify concerning: (1) his role, actions, and understandings as a senior leader of the NND Project; (2) construction schedules and their review; (3) Westinghouse's commitment to successfully completing the NND Project, mitigation, and oversight; (4) his understanding concerning productivity and potential productivity improvements; (5) challenges and issues faced by the NND Project; (6) SCE&G's efforts to enforce its rights under the EPC Contract and to motivate the contractors to improve their performance; and (7) other relevant aspects of his involvement with the NND Project as a senior leader of it.

***D. Terry Elam (Testimony by Deposition)***

Terry Elam is a Westinghouse employee who was the lead scheduler for the NND Project from December 2008, through abandonment. He was deposed on October 11, 2018. Counsel for all parties in these Consolidated Dockets were provided with an opportunity to appear at Mr. Elam's deposition. The transcript of Mr. Elam's October 11, 2018 deposition is attached hereto and incorporated herein as ***Exhibit 6***. Mr. Elam may testify regarding any matters raised in his October 11, 2018 deposition. He will likely testify about the efforts of more than 30 full-time employees who developed and maintained the complex schedule for the NND Project, which tracked more than 300,000 separate activities. Mr. Elam will also testify that, throughout the life of the NND Project, he always believed that the projected schedules that the Consortium provided to the Owners were accurate, were based on the best available information, and were achievable. He will further testify that, to the extent that there were delays with respect to the NND Project's schedule, the Consortium implemented mitigation strategies that they believed to be sufficient to meet the projected completion dates. The potential scope of Mr. Elam's potential testimony is otherwise set forth in his deposition.

***E. Daniel Magnarelli (Testimony by Deposition)***

Daniel Magnarelli served as Westinghouse's Director of Construction Integration and oversaw the installation of major equipment as part of the NND Project. He was deposed on October 12, 2018, and counsel for all parties to the Consolidated Dockets had the opportunity to appear at that deposition. The transcript of Mr. Magnarelli's October 12, 2018 deposition is not yet available, but it will be filed as ***Exhibit 7*** to this pre-hearing statement in advance of his testimony when it becomes available, and portions of his deposition testimony will be read and/or presented by videographic means at the hearing in the Consolidated Dockets. Mr. Magnarelli is expected to testify regarding: (1) issues related to NND Project scheduling; (2) the

installation of various pieces of equipment at the NND Project site; (3) productivity issues; (4) the retention of Bechtel; (5) Bechtel's assessment of the NND Project; and (6) demobilization of the NND Project site. The potential scope of Mr. Magnarelli's potential testimony is otherwise set forth in his deposition.

***F. Joni Falascino (Testimony by Deposition)***

Joni Falascino is the Westinghouse employee who was responsible for engineered equipment delivery and design for the NND Project, and who oversaw project delivery. Ms. Falascino was deposed on October 12, 2018, and counsel for all parties to the Consolidated Dockets had the opportunity to appear at that deposition. The transcript of Ms. Falascino's October 12, 2018 deposition is not yet available, but it will be filed as ***Exhibit 8*** to this pre-hearing statement in advance of her testimony when it becomes available, and portions of her deposition testimony will be read and/or presented by videographic means at the hearing in the Consolidated Dockets. Ms. Falascino may testify regarding any matter raised in her October 12, 2018 deposition, and is expected to testify regarding: (1) delivery and design issues; (2) design changes imposed by the Nuclear Regulatory Commission; (3) regulatory approvals; (4) issues related to the EPC Contract and amendments thereto; (5) Bechtel's assessment of the NND Project; and (6) abandonment of the NND Project. The potential scope of Ms. Falascino's potential testimony is otherwise set forth in her deposition.

**VII. OBJECTIONS TO ORS'S AND INTERVENORS' EXHIBITS**

The Joint Applicants' objections to pre-filed exhibits are as set forth in ***Exhibit 9***. The Joint Applicants do not consider exhibits to depositions to constitute pre-filed exhibits (even where an attempt to designate them as such has been improperly made) and reserve the right to make evidentiary and other objections to the introduction of any deposition as well as any

exhibits attached to any such deposition at a later date, including at the time any such deposition and/or exhibits may be offered for any purpose at the hearing.

### **VIII. CONCLUSION**

Joint Applicants' Customer Benefits Plan and Alternative Customer Benefits Plan as filed in the Consolidated Dockets provide the appropriate resolution of the regulatory issues related to the NND Project. Therefore, Joint Applicants request that the Commission issue an Order providing for the relief requested in its Petition and through its testimony. Joint Applicants reserve the right to supplement this pre-hearing brief as circumstances warrant.

This 26th day of October, 2018.  
Cayce, South Carolina

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